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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/804,900	03/19/2004	J. Kenneth Burkus	MSDI-134/PC361.18	8205
52196 7590 11/06/2007 KRIEG DEVAULT LLP ONE INDIANA SQUARE, SUITE 2800 INDIANAPOLIS, IN 46204-2709			EXAMINER CUMBERLEDGE, JERRY L	
			ART UNIT 3733	PAPER NUMBER
			MAIL DATE 11/06/2007	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Advisory Action  
Before the Filing of an Appeal Brief**

Application No.

10/804,900

Applicant(s)

BURKUS ET AL.

Examiner

Jerry Cumberledge

Art Unit

3733

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 09 October 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: \_\_\_\_\_.  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.

EDUARDO C. ROBERT  
SUPERVISORY PATENT EXAMINER

Continuation of 11. does NOT place the application in condition for allowance because: The examiner inadvertently sent an advisory action in response to the request for reconsideration filed 09/13/2007 stating that the claim amendments filed 04/17/2007 would require further search and/or consideration, even though the claim amendments had been addressed in the Final Office Action mailed 07/17/2007 (see pages 18-21). As such, the arguments presented in the request for reconsideration filed 09/13/2007 will be entered. Since the claim amendments were addressed in the Final Office Action, the action was proper. The arguments presented in the request for reconsideration filed on 09/13/2007 are not persuasive. Applicant argues that the examiner has not articulated any rational underpinning/ has not indicated a motivation as to why one of ordinary skill in the art would modify Michelson according to Paul et al. The examiner respectfully disagrees. It would have been obvious to a person having ordinary skill in the art at the time the invention was made to have constructed the distractor tips of Michelson with each having a transition surface extending between a distal end surface and said first surface of said at least one distractor and a transition surface extending between said distal end surface and said second surface of said at least one distractor tip, said surfaces each having a curvature shaped to generally correspond to a curvature of an inner portion of a cortical rim located at a posterior region of vertebral endplates in a sagittal plane as taught by Paul et al., in order to facilitate insertion of the device (column 4, lines 16-20). Applicant's arguments directed to the curvature "corresponding" to the curvature of the of an inner portion of a cortical rim are not persuasive, since corresponding requires only that two things be similar in structure or function (see definition of "correspond" previously supplied). Since both are curved, they are similar in structure and therefore correspond to each other. With regard to Applicant's argument that Applicant's device is self-locating, the examiner notes that this feature is not positively recited in the claims, and that a non-self locating device can still read on the claims as they stand. With regard to arguments directed to the Henry reference, the Henry reference has what can be considered to be two surfaces, since there is a gap provided between the surfaces, and the surfaces are curved along a portion of their lengths. With regard to the motivation found in the Henry reference, it would have been obvious to have modified the "base" references with the transition surface of Henry et al., in order to facilitate appropriate introduction and placement of the device, while reducing the risk of injury to surrounding tissue (Henry, column 1, lines 39-42).